

Noble (Fred and Faith) v. Safe Harbor Family Preservation Trust, et al.

No. 80873-2

CHAMBERS, J. (dissenting) — The majority concludes that a trial court may not look beyond the mechanical process of joinder in awarding attorney fees against a party in a condemnation action. While recognizing the broad discretion given to trial courts to award fees under RCW 8.24.030, the majority nevertheless concludes that “the statute does not support awarding fees against a condemnee where that condemnee does not choose to join any other party as an alternate condemnee.” Majority at 15. Because I do not read the statute to say anything of the sort and because the legislature and I believe the trial court is in the best position to determine which party is responsible for involving another in litigation, I respectfully dissent.

RCW 8.24.030 states, “[i]n any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys’ fees and expert witness costs may be allowed by the court to reimburse the condemnee.” The statute allows the court to require “the party responsible for involving the party seeking reimbursement of his attorney fees to pay those fees.” *Kennedy v. Martin*, 115 Wn. App. 866, 873, 63 P.3d 866 (2003). The statute does not specify who is required to pay

those fees to a potential condemnee. *Id.* at 874. Its language grants broad discretion to the trial court to determine from whom attorney fees are appropriately awarded. There is nothing in the statute itself, or in the case law, that requires the trial court to award fees only against those parties who take the formal step of joining another to the litigation.

Echoing the dissent in the Court of Appeals, 141 Wn. App. 168, 169 P.3d 45 (2007), the majority argues that awarding attorney fees against Safe Harbor Family Preservation Trust impermissibly shifts the burden of proof onto the original condemnee to prove that an alternative route is less burdensome rather than forcing the condemnor to prove that the proposed route is the most appropriate. While I agree that the burden remains on the condemnor to prove the route proposed is the most feasible, I do not agree that the discretionary award of attorney fees shifts that burden or has anything to do with the burden of proof at all. Where a condemnee argues that a more feasible alternative route exists, it is still incumbent upon the condemnor to demonstrate the selected route is more equitable, and the court must then weigh the benefits and burdens of each alternative route to arrive at an equitable solution. *Id.* at 870 (citing *Sorenson v. Czinger*, 70 Wn. App. 270, 276 n.2, 852 P.2d 1124 (1993)). But where the court later determines the alternative route proposed by the condemnee was clearly unfeasible and implausible, the judge has discretion under the statute to award attorney fees. While the burden remains on the condemnor to address all alternative routes raised by the original condemnee, vesting discretion in the trial court to later

award fees helps ensure that incredible alternatives are not presented in an effort to increase the costs of litigation.

The majority's focus on joinder is misplaced. That the condemnor chooses to join an alternate condemnee is immaterial. The statute does not suggest that only those who have not initiated litigation may be insulated from paying discretionary attorney fees, nor do I believe we should read such a limit into the statute. Nor is there any logical or policy reason for this court to impose such a limitation. Where a condemnee alleges a more feasible route, the condemnor has the choice of either joining the issues into one action or running the risk that two actions may be necessary. Judicial economy favors joinder, and our rules and procedures permit it. The majority's decision creates an untenable Hobson's choice for the condemnor: fail to join the alleged alternate condemnee and risk multiple and time consuming delays, or avail herself of the rules permitting joinder and run the risk that only she may be assessed the alternate condemnee's attorney fees.¹

In this case, the trial court concluded that Safe Harbor bore the responsibility for Tillicum Beach, Inc.'s involvement in the litigation. Not only did the court determine that the route proposed by Fred and Faith Noble was the more equitable route, it also specifically found that the alternative

¹ Under the majority's holding, neither party will be likely to move for the joinder of a third party condemnee. Despite the possible benefits of bringing in a third party, the better strategy would be to wait for the opposing party to take the initial, formal step of moving for joinder and be insulated from the later imposition of attorney fees. In my view, the better policy is to allow either party to move for joinder and to spread the risk that the trial court might award attorney fees amongst all parties.

route proposed by Safe Harbor over Tillicum's land would have involved relocating a drainfield, a well, water lines, and a shed, and constructing a new driveway. In its decision awarding attorney fees, the court noted that it became clear even prior to trial that an easement over Tillicum's property would not be possible. And in addressing the concerns raised by Paul Stokes regarding the burden of an easement on Safe Harbor's property, the trial court concluded those concerns were unfounded and even made a specific finding that Stokes himself was "not a credible witness." Clerk's Papers (CP) at 127. It appears from the record that the trial court believed that Safe Harbor's arguments regarding the feasibility of an alternative route over Tillicum's property and the burdens the proposed route would impose on its own property were unfounded, led to Tillicum's involvement in the case, and substantially increased the costs of litigation. Since that conclusion is supportable, I believe the trial court appropriately exercised its discretion under RCW 8.24.030 in awarding fees.

I find it telling that while the majority concludes that Safe Harbor cannot be held responsible for Tillicum's attorney fees because it did not take the formal step to join them as a third party, it still upholds the trial court's decision reducing the fees awarded to Safe Harbor from the Nobles by 70 percent. That 70 percent reduction represented in large part a "conservative estimate of the time spent involving Tillicum Beach as an alternate condemnee." CP at 19-20. If the reduction in fees is appropriate because of Safe Harbor's responsibility for Tillicum's involvement in the case, then I

believe it is equally appropriate to award Tillicum its fees against Safe Harbor. The statute is broad enough to support the trial court's decision in both instances and to uphold one decision and not the other is inconsistent.

In sum, RCW 8.24.030 allows a trial court to award attorney fees and costs to a condemnee in any condemnation action brought under chapter 8.24 RCW. I believe trial courts will appropriately use the broad discretion given to them under the statute to make reasonable determinations regarding whether to award fees, and if so, who should be required to pay them. By announcing a blanket rule limiting the court's discretion to award fees against only those who have taken the formal, procedural step of joining a third party condemnee, the majority reads the statute too narrowly. I believe the better course of action, and the one consistent with the statute, is to allow trial courts to make determinations based on the specific facts of each case. For the foregoing reasons, I respectfully dissent.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Debra L. Stephens
